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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 722

A. D. DYESS,

Petitioner,

vs.

H. J. MILLER.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS AND BRIEF IN SUPPORT THEREOF AND MOTION TO SUBSTITUTE.

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A. D. DYESS,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petitioner, A. D. Dyess, prays a writ of certiorari to review the judgment of the Supreme Court of Texas entered in this cause on March 19, 1941 (R. 165-173). A motion for rehearing (R. 174) and a motion to dismiss for lack of jurisdiction (R. 177) were filed April 3, 1941. Both motions were overruled May 21, 1941 (R. 193). A motion for rehearing of the motion to dismiss was filed June 5, 1941 (R. 197) and overruled July 9, 1941 (R. 221).

Statement.

This case involves the question of whether or not the Supreme Court of Texas may, consistently with the pro-

visions of the Fourteenth Amendment, exercise jurisdiction in a case where the writ of error has been prosecuted to said Supreme Court in the name of a deceased person, contrary to the statutes conferring jurisdiction on said Supreme Court.

The respondent, H. J. Miller, was the owner of 680 acres of land in Brazoria County, Texas, on December 10, 1928, when he conveyed said land to A. H. Edling, reserving a vendor's lien for the unpaid portion of the purchase price. Thereafter, on April 30, 1931, Edling conveyed the land to H. L. Middleton, Jr., in trust for his father, H. L. Middleton, Sr., who assumed payment of Edling's vendor's note to Miller. Subsequently on September 27, 1934, Middleton, Sr., conveyed to A. D. Dyess, petitioner herein, an undivided one-fourth oil and gas royalty interest in, on, and under the land in question (Opinion Ct. of Civil Appeals, R. 113; Opinion Supreme Court, R. 165, 166).

The deed from Middleton, Sr., to Dyess stated that Middleton was indebted to one Blackman in an amount secured by a deed of trust upon the said land; that Blackman was preparing to foreclose; that Middleton had employed Dyess "to bring such suit or suits in my behalf and in behalf of my son and trustee * * * as may be necessary to protect said property from foreclosure." The deed further stated that the employment of Dyess was on a contingent basis and that in consideration of services rendered and to be rendered by Dyess the grantor conveyed an undivided one-fourth interest in "oil, gas and other minerals in and under and that may be produced from said tract of land" to Dyess (Opinion Ct. of Civil Appeals, R. 114; Opinion Supreme Court, R. 166-167). The deed to Dyess was recorded on September 28, 1934, in Brazoria County Deed Records (Opinion Ct. of Civil Appeals, R. 115).

Pursuant to his contract of employment, Dyess on September 28, 1934, filed in the District Court of Brazoria

County, Texas, a petition on behalf of the Middletons against Blackman and one Abe Levy, Blackman's trustee under the deed of trust, whereby he asked for and obtained a temporary injunction restraining the foreclosure (Opinion Ct. of Civil Appeals, R. 115).

Thereafter, on February 9, 1935 Miller brought a foreclosure suit against H. L. Middleton, Jr., H. L. Middleton, Sr., and Joseph L. Poutra in the district court of Harris County to foreclose his vendor's lien note. Both the plaintiff, Miller, and his attorney had actual and constructive notice of Dyess' title but never made him a party to the foreclosure suit. (Opinion Ct. of Civil Appeals, R. 115).

After the filing of the said foreclosure suit, the said Dyess filed on behalf of Middleton a plea of privilege to be sued in the county of his residence, Matagorda County (Opinion Ct. of Civil Appeals, R. 115; Opinion Supreme Court, R. 168). The filing of the plea of privilege had no connection with the original contract of employment and was not contemplated by the parties at the time Dyess was employed by and received from Middleton the deed of conveyance (Opinion Ct. of Civil Appeals, R. 115-116, Testimony of Middleton Sr., R. 78).

Judgment was secured in the foreclosure suit by Miller, foreclosing the vendor's lien notes against H. L. Middleton Sr., H. L. Middleton Jr., and Joseph L. Poutra; and the land was sold by the sheriff of Brazoria County to H. J. Miller on June 4, 1935 (Pl. Ex. 7, R. 46). Thereafter Abe Levy, attorney for Miller, called on Dyess and stated that through an oversight he had not made Dyess a party defendant to the foreclosure suit and asked Dyess to execute and deliver a quit claim deed which Dyess refused to do. (Testimony of Levy, R. 90, 91).

Subsequently, on January 22, 1936, Miller by Levy as his attorney filed a suit in trespass to try title against A. D. Dyess in Brazoria County, Texas and it is to obtain a re-

view of the jurisdictional questions arising out of the judgments entered in this suit that this petition is filed. The District Court of Brazoria County, Texas on July 20, 1937 entered judgment decreeing that Miller, respondent herein, recover of Dyess, petitioner herein "the title and possession" of the land in question, (R. 17-19).

Petition for writ of error to the Court of Civil Appeals was duly filed by Dyess on November 4, 1937 and was allowed (R. 24) and on March 8, 1939 the Court of Civil Appeals entered its judgment reversing the District Court of Brazoria County, (R. 109) and on March 30, 1939 entered an order refusing a motion for rehearing (R. 119).

On April 20, 1939 Mrs. Martha Miller filed in the Court of Civil Appeals a Suggestion of Death wherein she stated that her husband H. J. Miller had died on September 10, 1938 which was after the writ of error was served and before the cause was decided by the Court of Civil Appeals. It was further stated that it was doubtful if it was necessary that she be substituted as a party but if so then it was accordingly prayed that the proper order be entered (R. 119-121). No order with reference to the Suggestion of Death was ever entered by the Court of Civil Appeals.

On April 25, 1939 an application for writ of error to the Supreme Court of Texas was made in the name of H. J. Miller (R. 121). The conclusion of said application reads as follows:

> "Plaintiff in error, H. J. Miller, prays that upon consideration of this petition writ of error be granted and that upon final hearing judgment of the Court of Civil Appeals be reversed and the judgment of the trial court be in all things affirmed and that judgment be entered herein in favor of plaintiff in error and that he recover all costs of court."

The petition is signed by "Robert L. Sonfield, Abe Levy, Attorneys for plaintiff in error, H. J. Miller" (R. 148-149). The application was granted on May 17, 1939 (R. 169) and

bond was filed on May 27, 1939, (R. 162-164). The Supreme Court of Texas on March 19, 1941 reversed the judgment of the Court of Civil Appeals and affirmed the judgment of the District Court of Brazoria County, (R. 173-174).

On April 3, 1941 Dyess, petitioner herein, filed a motion for rehearing and a motion to dismiss for want of jurisdiction, which clearly set forth the position of the petitioner that because of the death of H. J. Miller prior to the granting of the writ of error to the Supreme Court of Texas, that the Supreme Court was without jurisdiction to hear and decide the case because the writ of error was prosecuted in the name of a deceased person. The position which the petitioner advanced to sustain his contention in this respect was stated by the Supreme Court in its opinion overruling the motion to dismiss in the following words:

> "In the case at bar it is contended that the Court of Civil Appeals has exhausted its jurisdiction when it proceeded to final judgment under authority of Article 1850. We agree with such contention. Dyess then contended that Article 1760 cannot have any application to this case because H. J. Miller did not die after the jurisdiction of the Supreme Court had attached. We think there is no escape from sustaining such contention. H. J. Miller died while the case was still pending and wholly undecided in the Court of Civil Appeals. He did not die after the jurisdiction of the Supreme Court had attached" (R. 196).

Notwithstanding this direct holding that the petitioner herein was correct in his contention concerning the lack of jurisdiction of the Supreme Court of Texas that Court nevertheless retained jurisdiction and overruled the motion to dismiss on the ground that the application for writ of error should be read in conjunction with the suggestion of death and that when this was done it was apparent that the writ of error was prosecuted by Mrs. Martha Miller as independent executrix.

On June 5, 1941 the petitioner filed a motion for a rehearing of his motion to dismiss and in said motion in view of the arbitrary and capricious action of the Texas Supreme Court in retaining jurisdiction of the appeal after it had expressly ruled that by virtue of statutory provisions which were binding upon it, that it had no jurisdiction, the petitioner urged that the judgment deprived him of his property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States, (R. 200-201). The motion for rehearing the motion to dismiss was overruled by the Supreme Court on July 9, 1941.

Statutes.

The Revised Civil Statutes of Texas provide in part as follows:

> "Article 1760. If any party to the record in a cause pending in the Supreme Court dies after the writ of error has been served and before such cause has been decided by the Supreme Court, such cause shall not abate by such death; but the Court shall proceed to adjudicate such cause and render judgment therein as if all the parties thereto were living, and such judgment shall have the same force and effect as if rendered in the lifetime of all the parties thereto."
>
> "Article 1850. If any party to the record in a cause pending in a Court of Civil Appeals shall die after the appeal bond is filed and approved or after the writ of error has been served and before the cause has been decided, such cause shall not abate, but the Court shall proceed to adjudicate the case and render judgment therein as if all parties thereto were still living. Such judgment shall have the same force and effect as if rendered in the lifetime of all the parties thereto."

Questions Presented.

I. May a court retain jurisdiction of a writ of error after ruling that by its own construction of statutes limiting

its authority it had no jurisdiction because the writ of error was prosecuted in the name of a deceased person and without any substitution of heirs or legal representatives?

II. Does not such a retention of jurisdiction where its effect is to reverse a final judgment awarding title to property to defendant in error deprive defendant in error of his property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States?

Petitioner's Position.

Petitioner contends that upon the death of Miller the action abated as to him; that with the exception of entry of judgment by the Court of Civil Appeals the case could not be further prosecuted by Miller or anyone claiming under him until there had been a proper substitution of parties which substitution never was made; that the entry of final judgment by the Court of Civil Appeals exhausted that court's jurisdiction without reviving the case.

The Supreme Court of Texas never obtained jurisdiction of the case because of the fatal lack of a necessary party, the plaintiff in error. When the Supreme Court learned that the person in whose name the petition for the writ of error was filed was dead it should have in accordance with the great weight of authority, dismissed the writ for lack of jurisdiction, since there was never a necessary party before the court and consequently never any action before the court.

There can be no waiver, intentional or unintentional of lack of jurisdiction, therefore no action or failure to act on the part of the court, or the defendant in error conferred jurisdiction on the court.

In retaining jurisdiction after it had ruled, in accordance with the statutes of Texas which clearly limited its authority, that it had no jurisdiction the Supreme Court of Texas

acted in a manner entirely contrary to universal and long-established rules of law and therefore in an arbitrary and capricious manner.

By wrongfully retaining jurisdiction, the Supreme Court of Texas deprived petitioner of his property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States because the judgment of the Supreme Court reversed a final judgment of the Court of Civil Appeals which had conditionally awarded title to the property in question to the petitioner.

Reasons for Granting the Writ.

This case presents clearly a situation where there has been an arbitrary retention of jurisdiction by the Supreme Court of Texas although clearly under the applicable statutes, and its own interpretation thereof, it had no jurisdiction. The retention of jurisdiction results in depriving petitioner of his property which had been awarded to him by a previous final decision of a lower court.

The ruling presents, it is believed, substantial Federal questions which have been decided in a way contrary to principles set forth in applicable decisions of this Court *e. g.* among others *Stoll* v. *Gottieb,* 305 U. S. 165; *Exparte McCardle,* 7 Wall. 506; *Minneapolis and St. Louis R. R. Co.* v. *Peoria R. R. Co.,* 270 U. S. 580, 586; *Twining* v. *New Jersey,* 211 U. S. 78, 90; *Scott* v. *McNeal,* 154 U. S. 34, 46.

Wherefore it is respectfully requested that this petition for a writ of certiorari to review the judgment of the Supreme Court of Texas in this case be granted.

H. Russell Bishop,
Attorney for Petitioner.

H. D. Driscoll,
A. D. Dyess,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 722

A. D. DYESS,

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vs.

H. J. MILLER.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the District Court of Brazoria County, Texas is in the record at pages 20-27; the opinion of the Court of Civil Appeals is reported in 126 S. W. (2d) 538 and is at pages 113-119 of the record and the opinion of the Supreme Court of Texas is reported in 151 S. W. (2d) 186 and in the record at pages 165-173. The opinion of the Supreme Court on Motion for Rehearing and to Dismiss is in the record at pages 193-197.

Jurisdiction.

The jurisdiction of the Court is invoked under Section 237 (b) of the Judicial Code of the United States as amended by the Act of February 13, 1925, C. 229, 43 Stat. 937, (28 U. S. C. Sec. 344 (b)).

The judgment of the Supreme Court of Texas was entered March 19, 1941. A motion for rehearing (R. 174) and to dismiss for lack of jurisdiction (R. 177) were filed April 3, 1941, and overruled on May 21, 1941 (R. 220). A motion for rehearing the motion to dismiss was filed June 5, 1941 (R. 197) and overruled July 9, 1941 (R. 221). An order extending the time to file petition for certiorari to this court to and including October 30, 1941 was entered by Mr. Justice Black on October 7, 1941.

Questions Presented.

The questions here presented are stated in the Petition (*ante* pp. 6-7).

Statutes.

The statutes involved are in the Petition (*ante* p. 6).

Specification of Errors to be Urged.

These are indicated under the headings "Questions Presented" and "Petitioner's Position" in the Petition (*ante* pp. 6-7 and 7-8).

Summary of Argument.

The Summary of Argument is indicated under the heading "Petitioner's Position" in the Petition (*ante* pp. 7-8) and in the Subject-Index (*ante* pp. i-ii).

ARGUMENT.

POINT I.

The Supreme Court of Texas Had No Jurisdiction of the Writ of Error.

A.

A Writ of Error is a New Action and Like All Actions Must Have Necessary Parties to Confer Jurisdiction on the Court.

It has long been and still is the doctrine in most jurisdictions that a Writ of Error is new action and must be

prosecuted by and in the name of a real person, either natural or artificial. *Green* v. *Watkins,* 19 U. S. 119, 6 Wheat. 260; *Lippit* v. *Bidwell,* 87 Conn. 608, 89A, 397; *Security-First National Bank of Los Angeles* v. *King,* 23 P. (2nd) 851; *Iago* v. *Iago,* 168 Ill. 168, 339, 48 N. E. 30; *McCormick* v. *McClure,* 6 Blackf. (Ind.) 466; *Valentine* v. *Malone,* 269 Mich. 619; *Spotts* v. *Spotts,* 331 Mo. 917.

This rule has been the rule applied by the Texas courts over a long period of time, *Bailey* v. *Hoddy,* Dallam Dig. 346; *Gibbs* v. *Beecher,* 30 Tex. 79; *Stroud* v. *Nord* (Ct. Civil Appeals), 36 S. W. (2d) 590 and is still applied. It has never been rejected or overruled either by the Court of Civil Appeals or the Supreme Court of Texas.

It is elementary that actions cannot be brought by a deceased person or in his name and that in all actions there must be opposing parties either in existence as natural persons or as legal entities. It has been universally held that this requirement is not satisfied where a writ of error is prosecuted in the name of a dead person.

It is therefore submitted that when Miller died on September 10, 1938 (R. 119) that all causes of action in which he was or might have been a party abated with the exception of the then pending appeal in the Court of Civil Appeals which was kept alive only until entry of judgment by the Court of Civil Appeals by virtue of the provisions of Section 1850 of the Revised Civil Statutes of Texas (See Statutes, Petition *ante* p. 6). From that time on it was impossible to originate any actions in Miller's name and a writ of error is an original action.

B.

Miller Having Died Prior to the Decision of the Court of Civil Appeals the Writ of Error Abated as to Him.

As shown above it is necessary to have real and necessary parties to prosecute a writ of error. Miller, a dead person,

could not be a party to the writ of error nor could it be prosecuted in his name.

It is universally acknowledged that at common law and in the absence of statute a pending action abates upon the death of a necessary party thereto and cannot thereafter be prosecuted or defended in the name of such deceased party. The rule while an ancient one is not one of merely historical interest because it is followed and applied today with the same vigor as it was in times past. Nor is it a rule which is followed in only a few jurisdictions, as will be seen by the following cases:

In *William, Administrator* v. *Dean,* 131 S. E. 1, decided by the Special Court of Appeals of Virginia, an action of debt had been brought and judgment had been entered for the plaintiff, but before an appeal had been taken the defendant died. An appeal was then taken in the name of the deceased defendant and the administrator of the deceased subsequently filed a request to be substituted as petitioner in error. The court held that the administrator should have filed the original petition as only live persons, in their own right or in a representative capacity, can bring, prosecute or defend suits and the same rule applies to Writs of Error and Appeals. The court held in effect that bringing the appeal in the name of a dead person made the appeal fatally defective and void. To the same effect is *Rennolds* v. *William,* 136 S. E. 597, decided in the Supreme Court of Virginia.

In Re Harris' Estate, 11 P. (2d) 667, was a case decided by the District Court of Appeals of California. In that case an attorney not knowing of the death of his client had filed an appeal in her name. The court held that there was no valid appeal and as a result the court had no jurisdiction whatsoever and dismissed the appeal.

Vaughan v. *Seabolt,* 277 P. 643, was a case decided by the Supreme Court of Oklahoma. There a sole defendant had

died after judgment and before appeal and no revivor had been obtained. The court held that it had no jurisdiction of the appeal due to the lack of a necessary party and the court especially stressed that representatives of the deceased defendant had had time and opportunity in which to obtain a revivor.

To the same effect are two other Oklahoma cases: *Power* v. *Holder*, 33 P. (2d) 193, and *Nichols* v. *Beardsley*, 287 P. 72.

In *Power* v. *Standard Oil Company*, 251 N. W. 187, decided by the Supreme Court of South Dakota, an action had been brought for damages for negligent injury to property. After judgment had been entered for the defendant and before an appeal had been taken, one of the plaintiffs who was the real party in interest, the owner of the property, died and no substitution of parties was made. Thereupon an appeal was taken in the name of the decedent and a motion was made to dismiss the appeal. The court held that it had no jurisdiction in such a situation saying: "An appeal taken in the name of a dead man gives this Court no jurisdiction." A motion was made in the Supreme Court of South Dakota to make a substitution of parties but this was denied, and it is submitted, properly so, because the court held that since it had no jurisdiction, it could not substitute parties because no action at all was before it. A similar holding is found in *Independent Lubricating Company* v. *Good*, 280 N. W. 460, decided by the Supreme Court of Nebraska.

The Wisconsin Supreme Court made a similar finding in *Stevens* v. *Jacobs*, 276 N. W. 638. There an action had been brought by the plaintiff against several defendants and judgment had been entered for the defendants. Two defendants then died and the plaintiff appealed but failed to serve notice of appeal on all adverse parties as required and also failed to seek substitution as to the deceased de-

fendants. The court held that regardless of whether or not the survivorship statutes applied to proceedings in the Supreme Court and not only in the lower courts, nevertheless, the action must be properly brought before the Supreme Court and its jurisdiction must attach before death before the action could be revived in that court. The court held that since the action (that is, the appeal) had never been in the court that there was, therefore, no action to be revived in the Supreme Court.

In *Home Indemnity Company* v. *Young*, 8 N. E. (2d) 1006, the Appellate Court of Indiana had before it a motion to dismiss an appeal where before the filing of the appeal one of the appellees had died and no steps were taken to substitute a proper party. The statute in that State provided that an action could be revived when death occurred after judgment and before appeal, and that death should not cause abatement, but proceedings should continue on substitution. The court held that it had no jurisdiction because of lack of proper parties.

The foregoing summary of cases from various jurisdictions is set forth in order to demonstrate to this Court that petitioner's contention is not one which has been adopted merely to work out a narrow technical position on behalf of the petitioner which would result in his being victorious in this controversy. On the contrary, petitioner contends that the rule set forth above and which is in accord with the rule always observed in Texas until disregarded in this case by the Supreme Court is eminently reasonable, being as it is the general and well considered rule of the majority of jurisdictions. It is a rule which is an effective safeguard against one of the most oppressive acts that can ever be directed by any branch of the government against any of its citizens, that is, the arbitrary assumption and retention of jurisdiction by a court where there is no jurisdic-

tion; a refusal to test jurisdiction by the facts as they existed at the time when invocation of the jurisdiction of the court was first attempted, rather than by endeavors to justify the jurisdiction by matters subsequently appearing in the record which were not before the court at the time it assumed jurisdiction.

The rule in Texas (and it is important to bear in mind that this rule was not expressly overruled or rejected by the Supreme Court of Texas in this case) is that where at the time the Citation in Error was served, the plaintiff in error was dead, the Appellate Court acquired no jurisdiction to determine the cause and any judgment upon the merits of the case is a nullity.

In *Bargna* v. *Bargna*, 157 S. W. 754, the San Antonio Court of Civil Appeals, in construing the statutes and applying the reasoning of the Supreme Court of Texas applicable thereto, held that the appellate court had no jurisdiction to determine a cause in that peculiar situation, exactly existing here, where, at the time the citation in error was served, the plaintiff in error was dead; and by reason thereof, that any judgment rendered upon the merits by such appellate court would be an absolute nullity.

This rule is fundamental and is embodied in Texas law, almost as old as the state itself. Mr. Justice Lipscomb of the Supreme Court in *Bissell* v. *The City of Lavaca*, 6 Tex. 53, recognized the rule and declared the law to be that "proceedings subsequent to suggestion of the plaintiff's death without revival and carrying on the same in the name of his representatives were a nullity."

In *Simmang* v. *Cheney*, 155 S. W. 1198, the San Antonio Court of Civil Appeals held that a petition for writ of error, naming three persons as defendants in error, could not be considered as the suing out of a writ of error as to the executrix of one of them who had previously died.

In *Terry* v. *Schultz,* 38 S. W. 374, the Court of Civil Appeals of Texas stated as follows:

> "The statement of facts in this case shows that the only defendant, Charles Schultz, was dead when the judgment in his favor was rendered. The petition for Writ of Error states this fact but does not make any other person a party to the proceeding. The error bond is made payable to the dead man, reciting at the same time that he is dead. Service of the Writ of Error is waived by the attorney for 'the defendant in error' and the briefs are filed by the same counsel signed as 'attorney for defendant in error C. Schultz'. Under repeated decisions, this Court has no jurisdiction of the case and the Writ of Error is dismissed. *Dial* v. *Rector* 12 Tex. 99; *Johnson* v. *Robeson* 27 Tex. 526; *Smith* v. *Parks* 55 Tex. 82."

In *Saner-Ragley Lumber Company* v. *Spivey,* 230 S. W. 878, decided by the Court of Civil Appeals of Texas, the facts were as follows: A sole plaintiff brought an action on a contract and then died. The trial court substituted the plaintiff's representatives as plaintiffs and gave judgment for the plaintiffs. Subsequently one of the substituted plaintiffs died and defendant sued out Writ of Error and served the attorneys of the plaintiffs naming as one of the defendants in error the dead substituted plaintiff. A motion to dismiss the Writ of Error was filed and was opposed by the plaintiff in error on the ground that there had been a waiver by the defendant in error in accepting service of the citation for the writ. In its opinion the Court stated that a Writ of Error cannot be sued out in the name of a dead person or against a dead person. It further stated that where a party to an action dies before a Writ of Error is sued out, it is required that a Suggestion of Death be filed and substitution of proper parties made "as a necessary condition to a review by an appellate court". The Court further held

that there is no statutory provision for continuing a case against a successful party who dies before the writ is perfected. The Court held that it had no jurisdiction and therefore the parties could not confer jurisdiction upon it either by waiver or estoppel and the writ was dismissed.

The foregoing discussion, it is submitted, amply demonstrates that the general rule and the rule in Texas is that upon the death of a party, an action abates as to him and that any further continuation of the case as to him or his representatives can be made only upon a proper showing as to who his representatives or successors in interest are and a substitution of such successors or representatives. There is no rejection of this doctrine in the opinion of the Supreme Court of Texas in this case. On the contrary, the Court said:

> "In the case at bar it is contended that the Court of Civil Appeals exhausted its jurisdiction when it proceeded to final judgment under authority of Article 1850. We agree with such contention. Dyess then contends that Article 1760 cannot have any application to this case, because H. J. Miller did not die after the jurisdiction of the Supreme Court had attached. We think there is no escape from sustaining such contention. H. J. Miller died while the case was still pending and wholly undecided in the Court of Civil Appeals. He did not die after the jurisdiction of the Supreme Court had attached.
>
> In spite of what we have said, we think the jurisdiction of the Supreme Court attached in this case. As already shown, after the Court of Civil Appeals had entered its final judgment, and after that court had overruled motion for rehearing, Mrs. Miller filed in this cause the instrument in writing above described. Such instrument was filed in the Court of Civil Appeals and in this Court. It shows upon its face that H. J. Miller was dead, and that he had died while the jurisdiction of the Court of Civil Appeals was in force. It further shows that it was filed to be considered by this

> Court along with the application for Writ of Error, 'in order that said cause be prosecuted to the Supreme Court of Texas, and that application for Writ of Error may be filed herein.' *We think that the application for Writ of Error should be considered along with the above described instrument, and that the two instruments should be considered together in considering the sufficiency of the application for the writ. When this is done, it is evident that the Writ of Error was prosecuted to this Court by Mrs. Martha Miller as independent executrix under the will of H. J. Miller, deceased, and as the owner of the land here involved under the will of H. J. Miller, deceased.*" (Italics supplied, R. 196-197).

The foregoing quotation it is submitted is a direct holding that at the time the application for writ of error was filed and allowed that the Court was without statutory authority (and it has no other authority) to issue the writ. While the Court states that the Suggestion of Death was filed both in the Court of Civil Appeals and in the Supreme Court, this does not in any way change the situation.

It will be seen by reading the italicized section of the quotation that the Court arbitrarily determined that it would work out some theory, however unsound, by which it would retain jurisdiction of the case. The Court therefore says that it will consider the application for writ of error together with the Suggestion of Death. But this the Court may not do. The Suggestion of Death was not before it when the application for writ of error was filed and allowed. In attempting to assert jurisdiction by reason of matters appearing to it subsequent to the date when the application for writ of error was filed, the Court has violated one of the cardinal rules for determining whether or not a court has jurisdiction. The rule is that the jurisdiction of a court depends upon the state of facts existing at the time a suit is brought. *Minneapolis and St. Louis R. R. Co.* v. *Peoria R. R. Co.*, 270 U. S. 580, 586; *Dawson* v.

Kentucky Distilleries and Warehouse Co., 255 U. S. 288, 296; *Consolidation Coal Co.* v. *Western Maryland Railway Co.*, 55 F. (2d) 595, 596. It follows that if the Court lacked jurisdiction at the time it allowed the application for writ of error it could not thereafter by reason of inspecting any documents subsequently filed obtain jurisdiction. Every act of the Court after allowance of the writ was a nullity; it had power to do only one thing—dismiss the writ.

C.

None of the Facts in the Case Support the Finding That Jurisdiction Existed.

I.

The Supreme Court of Texas is a court of limited jurisdiction and it has no powers other than those granted by statute. In a recent case wherein an attempt had been made to confer jurisdiction upon it by agreement the Supreme Court of Texas said:

> "The rule is well established that the appellate jurisdiction of the Supreme Court is derived from the law only, and it cannot be conferred by consent or agreement of the parties. Sec. 3, Art. 5, Constitution of Texas; *Owens* v. *Tedford*, 114 Tex. 390, 269 S. W. 418; *McCullough* v. *McCullough* (Tex. Com. App.), 35 S. W. (2d) 459; 3 Tex. Jur. pp. 66 and 67, Sec. 23; 11 Tex. Jur. p. 719, Sec. 12. This being true, the agreement presented seeking to confer jurisdiction upon the Supreme Court for the purpose of effectuating a compromise or settlement of the judgments of the lower courts cannot be entertained." *Loving* v. *Laird*, 122 Tex. 18, 50 S. W. (2d) 260, 261.

The rule is universal that a court such as the Supreme Court of Texas which is purely the creature of statute has no jurisdiction other than that conferred by the enabling

statute and it is equally true that this jurisdiction can only be invoked in the manner provided by statute. As recently said by this Court in *Stoll* v. *Gottlieb,* 305 U. S. 165 at page 171 by Mr. Justice Reed:

> "A Court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators. There must be admitted, however, a power to interpret the language of the jurisdictional instrument and its application to an issue before the Court."

This statement well illustrates what happened in the Supreme Court of Texas when it refused to grant the motion to dismiss for lack of jurisdiction.

After the decision in the Supreme Court of Texas had been entered the petitioner herein filed a motion to dismiss for lack of jurisdiction. In overruling it the Supreme Court of Texas held (R. 196) that the Court of Civil Appeals exhausted its jurisdiction when it proceeded to final judgment under authority of Article 1850 of the Revised Civil Statutes of Texas. It then held (R. 196) that Article 1760 of the said statutes had no application and therefore the Supreme Court of Texas under the statute would have no authority to proceed to final judgment because Miller had died before any attempt was made to prosecute the Writ of Error to the Supreme Court of Texas. Up to that point in its opinion the Supreme Court of Texas was exercising the "power to interpret the language of the jurisdictional instrument and its application to an issue before the Court." As a result it found that the statutory law applicable did not sustain the Court's jurisdiction; that the facts in the case could not bring it within the statute which would have prevented the action from abating. Having reached this decision there was no lawful course left open for the Supreme Court of Texas to follow but to grant the motion to dismiss, because when it found that under the applicable

statutes it had no jurisdiction, it had then exhausted its jurisdiction. Every court has the right to determine whether or not it has jurisdiction of a matter. *Texas & Pacific Ry. Co.* v. *Gulf C. & S. F. Ry. Co.*, 270 U. S. 266, 274; *Matter of Gregory*, 219 U. S. 210, 217, but having determined that it has no jurisdiction it should announce the fact and dismiss the cause. *Ex parte McCardle*, 7 Wall. 506.

The Supreme Court of Texas, however, did not "announce the fact and dismiss the cause, it extended by 'judicial fiat' its jurisdiction 'beyond the scope of the authority granted to it by its creators' ".

The court said with reference to its finding that it had no jurisdiction under the statute:

> "In spite of what we have said, we think the jurisdiction of the Supreme Court attached in this case" (R. 196).

The court then held that the Suggestion of Death and the application for the writ of error should be considered together and:

> "When this is done it is evident that the writ of error was prosecuted to this Court by Mrs. Martha Miller as independent executrix under the will of H. J. Miller, deceased, and as the owner of the land here involved under the will of H. J. Miller, deceased" (R. 197).

The court reached this conclusion by a tortured construction of the plain words employed by respondent in documents filed in connection with the writ of error. These documents are (1) Application for Writ of Error (2) the Suggestion of Death and (3) the Writ of Error Bond.

The application for writ of error (R. 121-149) was filed on April 25, 1939 and was filed in the name of H. J. Miller who was then deceased having died on September 10, 1938

(Suggestion of Death R. 119). Its first sentence reads: "Now comes H. J. Miller and presents this application * * * (R. 121). It then states: "Plaintiff in the trial court is the plaintiff in error herein" (R. 122). Then three paragraphs later it states:

> "During the pendency of the appeal, after the writ of error was served and before the cause was decided by such Court of Civil Appeals, H. J. Miller died. He left a will which has been duly probated and wherein his surviving widow (fol. 174), Mrs. Martha Miller, is named as independent executrix without bond and she has duly qualified as such. The property here involved was by such will bequeathed to the said Mrs. Martha Miller. These facts have been made known to the Court of Civil Appeals" (R. 122).

This is the only place in the application when any reference is made of Miller's death and it wholly fails to mention a substitution of parties. In fact, the entire application shows an intention to retain H. J. Miller as plaintiff in error and applicant for the writ.

The conclusion of the application reads as follows:

> "Plaintiff in error, H. J. Miller, prays that upon consideration of this petition writ of error be granted and that upon final hearing judgment of the Court of Civil Appeals be reversed and the judgment of the trial court be in all things affirmed and that judgment be entered herein in favor of plaintiff in error and that he recover all costs of court * * *.
>
> Mr. Robt. L. Sonfield, 510 Gulf Building, Houston, Texas, and Mr. Abe Levy, 614 Sterling Building, Houston, Texas, are the attorneys of record for plaintiff in error, H. J. Miller" (R. 148-149).

It is well nigh impossible to conceive how the Supreme Court in considering this application either when first presented to it or subsequently, whether considering it separately or with the Suggestion of Death could reach any

other conclusion but that an attempt was being made to prosecute a writ of error to the court in the name of a dead person and therefore without an actual plaintiff in error. The petition was obviously a sham because of the lack of a real party in interest and therefore the Supreme Court was obviously without jurisdiction to issue the writ.

It is submitted that the test of jurisdiction must be made by considering the facts as they existed at the time the application for the writ was made, *Minneapolis and St. Louis R. R. Co.* v. *Peoria R. R. Co.*, 270 U. S. 580, 586, and that the Supreme Court of Texas was therefore without power subsequently to consider the application for the writ with the Suggestion of Death which was not attached as an exhibit to the application.

Laying this to one side, however, and conceding the validity of such a method it is seen that instead of resolving the doubt in favor of jurisdiction, it but increases that doubt. The Suggestion of Death (R. 120, 121) prays in the alternative that the court substitute Mrs. Martha Miller in place of her husband if necessary, otherwise that the petition be "treated as notice to this Honorable Court of the death of the said H. J. Miller."

"No action was taken by the Court of Civil Appeals on the above instrument or motion" (Opinion of Supreme Court on Application For Rehearing, R. 194). By considering the Suggestion of Death together with the application for writ of error we find, (a) that the application was made in the name of a deceased person, (b) that the Suggestion of Death was merely filed, that no order based upon it substituting parties was ever entered. Therefore it follows that the Supreme Court was without jurisdiction of the writ of error for two reasons, (a) the application was not made in the name of a real party and therefore there was a fatal lack of a necessary party, (b) the only court which

could have done so having failed to substitute the executrix as plaintiff in error there could not be any plaintiff in error to make the application.

The writ of error bond was never filed in accordance with the order of the court which directed that the "writ of error issue as prayed for, upon the filing by applicant of a bond * * *" (R. 162). The bond, however, was never filed by "the applicant", H. J. Miller, for the good and sufficient reason that he was dead and could not file it. It was filed by Robert L. Sonfield, "One of the attorneys for Plaintiff in error and the agent and representative thereof" and Mrs. Martha Miller. Therefore a necessary condition of the order allowing the writ was never complied with.

In view of the foregoing it is submitted that not one fact in this case supports the finding of the Supreme Court that it had jurisdiction but, on the contrary, every fact having any bearing on the jurisdictional question bears out petitioner's contention that the Supreme Court of Texas never acquired jurisdiction of the case.

Point II.

Retention of jurisdiction by the Supreme Court of Texas deprived petitioner of property without due process of law in violation of the Fourteenth Amendment.

A.

Judgments Entered by a Court Without Jurisdiction Are a Nullity and Offend Against Due Process of Law.

In *Scott* v. *McNeal*, 154 U. S. 34, the Court stated as follows by Mr. Justice Gray (p. 46):

> "No judgment of a court is due process of law if rendered without jurisdiction in the court or without notice to the party. * * * Even a judgment in pro-

> ceedings strictly *in rem* binds only those who could have made themselves parties to the proceedings, either actually, or by the thing condemned, being first seized into the custody of the Court * * * and such a judgment is wholly void if a fact essential to the jurisdiction of the Court did not exist."

It is well settled that the protection of the Fourteenth Amendment against arbitrary State action extends to judicial action. Mr. Justice Brandeis in *Ownbey* v. *Morgan*, 256 U. S. 94, 111, stated:

> "The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government", citing *Moore* v. *Dempsey*, 261 U. S. 86; *Standard Oil Co.* v. *Missouri*, 224 U. S. 270, 281; *Frank* v. *Mangum*, 237 U. S. 309, 326, 335.

The action of the Texas Supreme Court was clearly arbitrary. In retaining jurisdiction it disregarded its own interpretation of the abatement statutes and had recourse to documents which it had no right to consider. It thereupon violated the provisions of the Fourteenth Amendment prohibiting the taking of property without due process of law.

B.

The Petitioner Has Been Deprived of His Property.

There can be no question here but that the petitioner has been deprived of his property. The Court of Civil Appeals had conditionally awarded to the petitioner title to the land in question. The decision of the Supreme Court of Texas reverses this judgment and divests petitioner of his title to the property. Clearly, this is a deprivation of property and, under the circumstances, one without due process of law.

Conclusion.

The Supreme Court of Texas had no jurisdiction of the case and its judgment should be reversed.

H. Russell Bishop,
Attorney for Petitioner.

H. D. Driscoll,
A. D. Dyess,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 722

A. D. DYESS,

Petitioner,

vs.

H. J. MILLER.

MOTION TO SUBSTITUTE MRS. MARTHA MILLER AS RESPONDENT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

In the above entitled case the petitioner seeks a writ of certiorari to review a judgment of the Supreme Court of Texas. While the said case was pending in the Court of Civil Appeals of Texas, H. J. Miller died. His widow, Martha Miller, filed a suggestion of death with the Court of Civil Appeals (R. 119-121) wherein she stated that H. J. Miller had died; that she had been appointed independent executrix of his estate; that it was doubtful if it was necessary that she be substituted as a party to the suit, but if it was necessary that she be so substituted. No substitution

was made by the Court nor by the Supreme Court of Texas which granted a writ of error to the Court of Civil Appeals.

Petitioner respectfully requests said Mrs. Martha Miller be substituted as respondent in this case.

H. Russell Bishop,
Attorney for Petitioner.

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